

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 98-0754**

**Adjusted Gross Income Tax**

Calendar Years 1987 RAR, 1992, 1993, 1994, 1995, and Short Year 10/30/96

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**ISSUE(S)**

**I. Adjusted Gross Income Tax – Construction in Progress**

**Authority:** 45 IAC 3.1-1-46;

Taxpayer protests the inclusion of Construction in Progress in the property factor.

**II. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10.1; 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

**STATEMENT OF FACTS**

Taxpayer protested the inclusion of construction in progress in the property factor for fiscal year ended October 31, 1996. Auditor included construction in progress in the property numerator for the average construction in progress.

**I. Adjusted Gross Income Tax – Construction in Progress**

**DISCUSSION**

At issue is whether the taxpayer must include construction in progress in the numerator for apportionment.

45 IAC 3.1-1-41 states:

The property factor includes all property owned or rented by the taxpayer which is actually used or is available for or capable of being used to produce business income...Property under construction during the tax period (except inventoriable goods in process) are includable only if and only to the extent it is actually used to produce business income.

In its letter dated October 19, 1999, taxpayer states the property in question has not been placed in service and was not used to produce business income during the tax period in question.

Taxpayer's construction in progress did not produce business income during the audit period.

### **FINDINGS**

Taxpayer's protest is sustained.

## **II. Tax Administration - Penalty**

### **DISCUSSION**

Taxpayer protests the imposition of the ten percent (10%) negligence penalty. The negligence penalty imposed under IC 6-8.1-10-2.1 may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2.1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. 45 IAC 15-11-2(c).

Taxpayer made several errors in all years of the audit, some of which resulted in zero tax assessments due to loss carryovers. The adjustments include high rate gross receipts from vending commissions and FAA land rent. Taxpayer failed to add back state income taxes, deduct expenses for dividends paid, include capitalized rent in the property denominator, goodwill in the sales numerator, throwback sales in the sales numerator, and other business receipts.

Taxpayer states that its filing was reasonable and, in the absence of Indiana judicial precedents, it

certainly exercised ordinary business care in relying on the judicial precedents of other states with statutes identical to that of Indiana.

Taxpayer, however, made several errors that are clear in the Indiana Code and Regulations and taxpayer did not provide reasonable cause to allow the department to waive the negligence

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penalty.

**FINDING**

Taxpayer's protest is denied.

**CONCLUSION**

The taxpayer's protest is sustained for Issue I and denied with respect to Issue II. The audit file is returned to audit for supplemental.

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